Supreme Court, U. S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-320

BRANIFF AIRWAYS, INC.,

Petitioner,

v.

EL PASO COIN COMPANY, INC., and
CONTINENTAL AIRLINES, INC.,

Respondents.

Petition for a Writ of Certiorari To The Court of Civil Appeals for The Eighth Supreme Judicial District of Texas

HAROLD L. SIMS,
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EL PASO COIN COMPANY, INC., and
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Petition for a Writ of Certiorari To The Court of Civil Appeals for The Eighth Supreme Judicial District of Texas

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Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas entered in the above-entitled case.

CITATION TO OPINIONS BELOW

The findings of fact and conclusions of law and the judgment rendered by the District Court of El Paso County, Texas, 120th Judicial District, appear in Appendix A, *infra*. The opinion of the Texas Court of Civil Appeals is reported in 517 S.W. 2d 915 and appears in Appendix B, *infra*. The order of the Texas Supreme Court refusing Petitioner's application for writ of error and its order overruling Petitioner's motion for rehearing appear in Appendix C, *infra*.

JURISDICTION

The judgment of the Texas Court of Civil Appeals was entered on December 31, 1974, and rehearing was denied on January 29, 1975. Petitioner's application for writ of error to the Texas Supreme Court was denied on May 7, 1975, and Petitioner's motion for rehearing was denied on June 4, 1975. *See* TEX. R. CIV. P. 467 and 484. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether the federal air freight tariff rules and regulations set out and control the respective rights and liabilities of shippers and carriers in interstate air freight transactions.

STATUTES AND REGULATIONS

The following statutes and regulations appear in pertinent part in Appendix D, *infra*.

1. The pertinent federal statutes are 49 U.S.C. §§ 1321 (a) (1), 1324(a) and 1373(a).
2. The pertinent regulations of the Civil Aeronautics Board are 14 C.F.R. §§ 221.38(a) and 221.102.
3. The pertinent provisions of the Official Air Freight Rules Tariff No. 1-B, "Rules and Regulations," C.T.C. (A) No. 39, C.A.B. No. 96 are Rules 2, 23(B), 26(F), 30(B) (1) (b), 30(B) (1) (c) and 34 [in effect December 18, 1972].

STATEMENT

This is an interstate air freight shipment and loss case. Respondent El Paso Coin Company was the shipper; Respondent Continental Airlines, Inc. (hereinafter "Continental") was the initial carrier; and Petitioner Braniff Airways, Inc. (hereinafter "Braniff") was the connecting and terminal carrier.

On December 18, 1972, El Paso Coin Company delivered to Continental at the El Paso International Airport three

five-gallon paint cans containing gold coins. Each can was a shipment of extraordinary value under the air freight tariff. Tariff Rule 2, *supra*. Three rapid airbills were prepared with the listed destination of LaGuardia Airport in New York. Contrary to the tariff requirements, El Paso Coin Company made no advance arrangements with Continental. Tariff Rule 26(F), *supra*.

Continental transported the shipments to Dallas, Texas, where they were delivered to Braniff as regular air freight. Continental also made no advance arrangements. *See* Tariff Rule 2, *supra*. Braniff's supervisory personnel, not being alerted by any advance arrangements of the extraordinary value of the shipments, did not initiate special handling and security procedures. As that day's flights to LaGuardia had already departed, the shipments were loaded as regular air freight on a flight to Kennedy Airport.[1] Braniff provided regular ground freight transportation between the two New York airports.

At Kennedy Airport, Braniff's air freight manager received two of the shipments. The third was missing.

El Paso Coin Company sued Continental and Braniff for the value of the missing shipment in the District Court of El Paso County, Texas. The trial court concluded that both Continental and Braniff had *waived* the advance arrangements rule of the air freight tariff. This conclusion was in direct contravention of Rule 26(F) of the tariff, which expressly stated that tariff provisions could *not* be waived or modified.[2] After finding waiver, the trial court ignored the tariff rules and held Braniff negligent in rerouting and failing to deliver the shipment. El Paso Coin Company was awarded recovery of the value of the shipment, plus interest,

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[1] If special handling procedures had been initiated, the shipments would have been met in Dallas by a Braniff supervisor, kept overnight under security and sent directly to LaGuardia Airport the next day on a non-stop flight.

[2] Rule 26(F) reads in pertinent part as follows: "[N]o agent, servant or representative of the carrier has authority to alter, modify or *waive* any provision of the contract of carriage or of this tariff." [Emphasis supplied].

and Braniff was ordered to indemnify Continental. Prior to appeal, Continental paid the judgment and became the assignee of El Paso Coin Company's rights and interest.

The Texas Court of Civil Appeals sidestepped the specific findings and conclusions of the trial court. It stated the waiver question to be "academic," determining that "the failure to comply with the tariff did not relieve Braniff of liability." According to the Court of Civil Appeals, "If the waiver would not affect the outcome, it matters not whether there could be or was such a waiver." 517 S.W. 2d at 918. The Court of Civil Appeals held that there were no controlling federal tariff regulations,[3] that the Texas Uniform Commercial Code controlled the rights and liabilities of the parties,[4] and that Braniff failed to establish tariff violations as the "sole proximate cause" of the loss.[5]

The Texas Supreme Court refused Braniff's writ application, which challenged each of the foregoing elements of the Court of Civil Appeals' opinion, finding no reversible error.

A summary of pleading excerpts and points of error specifying at what stage and in what manner a federal question was raised appears in Appendix E, *infra*.

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[3] The Court of Civil Appeals stated that "in this particular area as to air carriers there is *no* Federal regulation setting out the rights and liabilities between shipper and carrier and connecting carriers nor is it spelled out in the tariffs." 517 S.W. 2d at 916 [emphasis supplied].

[4] The Texas Uniform Commercial Code, according to the Court of Civil Appeals, "is controlling of the matters presented in this case." 517 S.W. 2d at 917. Pursuant to Section 7.302, Tex. Bus. & Comm. Code Ann., Continental, as the issuer of the bill of lading [which includes an airbill under Section 1.201(6)], was liable to El Paso Coin Company, and the issuer was entitled to recover in turn from the connecting carrier, Braniff, because the loss occurred while the shipment was in its possession.

[5] The court noted that, a *prima facie* case having been made by means of the Commercial Code, Braniff could escape liability only through excuse. Braniff's "tariff-violation excuse" required proof that such violation was the "sole proximate cause" of the loss, said the court, and this burden was not met. 517 S.W. 2d at 917.

REASONS FOR GRANTING THE WRIT

A question vital to interstate air freight carriers and to the supremacy of federal law in a preempted area is presented. The Federal Aviation Act and rules and regulations promulgated by the Civil Aeronautics Board control the rights and liabilities of shippers and carriers in interstate air freight transactions. A state appellate court has ignored and blatantly refused to apply these federal rules and regulations and has instead utilized state commercial law in resolving liability. This precedent is dangerous and deprives air freight carriers of substantive federal rights which a state court is bound to protect. This precedent directly conflicts with existing federal decisions and raises a federal question requiring immediate review.

I.

THE TEXAS COURT OF CIVIL APPEALS REFUSED TO APPLY CONTROLLING FEDERAL AIR FREIGHT TARIFF RULES AND REGULATIONS WHICH SET OUT THE RIGHTS AND LIABILITIES OF SHIPPERS AND CARRIERS.

The court below stated that there is "no federal regulation *setting out* the rights and liabilities between shipper and carrier." 517 S.W. 2d at 916 [emphasis supplied]. No assertion could be further from fact.

In accordance with the Federal Aviation Act, the Civil Aeronautics Board is empowered to promulgate rules and regulations. 49 U.S.C. § 1324(a).[6] Rules and regulations pertaining to actual transportation are drafted by carriers, but filed with and approved by the Board. 49 U.S.C. § 1373(a); 14 C.F.R. § 221.3(a). Such rules and regulations contain provisions that "remove all doubt as to their application" and are published in a single tariff. *See* 14 C.F.R.

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[6] The Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et. seq.*, governs air transportation in interstate, and to some degree, intrastate commerce. *Eighth Air Depot, Inc. v. Pan American World Airways, Inc.*, 254 So. 2d 564, 565 n.1 (Fla. Dist. Ct. App. 1971); *see also* Note, *Transporting Goods by Air*, 69 Yale L.J. 993 (1960).

§§ 221.38(a)(1) and 221.102; Official Air Freight Rules Tariff No. 1-B, "Rules and Regulations," C.T.C.(A) No. 39, C.A.B. No. 96 [in effect December 18, 1972].

The applicable tariff speaks specifically to "articles of extraordinary value" and acceptance of such articles "provided that advance arrangements are made." Tariff Rules 2 and 23(B), *supra*. No agent of the carrier has the authority to "modify or waive any provision" of the tariff. Tariff Rule 26(F), *supra*. Under the tariff provisions, the shipper "shall be liable" to "indemnify the carrier" for damages suffered "by reason of *any* violation of any of the rules" by the shipper. Tariff Rule 34, *supra* [emphasis supplied]. A carrier is also relieved of liability if the damage results from the default of the "consignor." Tariff Rules 30(B)(1)(b) and (c), *supra*. The foregoing provisions, *inter alia*, do *set out* succinctly the rights and liabilities of shippers and carriers. Official Air Freight Rules Tariff No. 1-B, *supra*.

Federal courts have had no difficulty in applying the air freight rules tariff. *See Blair v. Delta Air Lines, Inc.*, 344 F. Supp. 360 (S.D. Fla. 1972), *aff'd*, 477 F. 2d 564 (5th Cir. 1973). To the contrary, federal courts have held that a tariff, required by law to be filed, constitutes the law and is not merely a contract. *See Carter v. American Telephone & Telegraph Co.*, 365 F. 2d 486, 496 (5th Cir.), *cert. denied*, 385 U.S. 1008 (1966). Tariff provisions strictly govern freight loss or damage. *Milhizer v. Riddle Airlines, Inc.*, 185 F. Supp. 110 (E.D. Mich. 1960), *aff'd*, 289 F. 2d 933 (6th Cir. 1961). Tariff provisions accepted by the Civil Aeronautics Board may contain exculpatory clauses and limitations of liability for loss or damage, regardless of fault. Such provisions are not prohibited by the Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et seq*. *Tishman & Lipp, Inc. v. Delta Airlines*, 275 F. Supp. 471, 475 (S.D.N.Y. 1967), *aff'd*, 413 F. 2d 1401 (2nd Cir. 1969).

In sum, the "established rule" in the federal courts is that provisions of the air freight tariff "conclusively and exclusively govern the rights and liabilities between the

parties." *Mao v. Eastern Air Lines, Inc.*, 310 F. Supp. 844, 846 (S.D.N.Y. 1970); *see also Alco-Gravure Division of Publications Corp. v. American Airlines, Inc.*, 173 F. Supp. 752, 755 (D. Md. 1959). Courts in other states have followed this rule and have found the provisions of the Federal Aviation Act and the tariff sufficiently explicit to warrant recognition and enforcement. *Cf. Eighth Air Depot, Inc. v. Pan American World Airways, Inc.*, *supra* n. 6.

The holding of the court below maintaining the nonexistence of a federal tariff *setting out* the rights and responsibilities of shippers and carriers is totally in error.

II.

THE TEXAS COURT OF CIVIL APPEALS ERRONEOUSLY APPLIED STATE COMMERCIAL LAW IN RESOLVING THE RIGHTS AND LIABILITIES OF INTERSTATE SHIPPERS AND CARRIERS.

The court below stated that the Texas Uniform Commercial Code was "controlling of the matters presented in this case." 517 S.W. 2d at 917; *see* Tex. Bus. & Comm. Code Ann. §§ 7.302 and 7.403. No authority was cited in support of this holding; no such authority can be found.

Patently, federal law governs the resolution of rights and liabilities in interstate air freight transactions. *Blair v. Delta Air Lines, Inc., supra; Tishman & Lipp, Inc. v. Delta Airlines, supra*. Rather than applying such law, the court below amazingly utilized state commercial law to place ultimate liability upon Braniff! This clearly erroneous application of state commercial law in a case demanding enforcement of federal rules and regulations was not only in derogation of Braniff's rights as a licensed carrier, but was a deliberate circumvention of the intent and letter of the Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et seq*. This court should not permit such a holding to stand.

III.

THE TEXAS COURT OF CIVIL APPEALS IMPROPERLY CONSTRUED THE NATURE AND EFFECT OF EXISTING FEDERAL AIR FREIGHT TARIFF RULES AND REGULATIONS.

The court below, relying on the rationale of *Travelers Insurance Co. v. Delta Air Lines, Inc.*, 498 S.W. 2d 443 (Tex. Civ. App. — Texarkana 1973, no writ), construed the applicable tariff provisions so as to require Braniff to establish what was termed its "tariff-violation excuse" through a showing of "sole proximate cause." 517 S. W. 2d at 917-18.

Without citing specific tariff rules, the Texas Court of Civil Appeals in *Travelers* stated that a carrier, in order to escape liability on the basis of an act or omission of the shipper, would have to show that the act of the shipper was the "sole proximate cause" of the loss or failure to deliver. 498 S.W. 2d at 446. According to that court, "Any [further] attempt by the carrier to restrict its liability in this regard by provisions in the * * * tariff [would be] against public policy and void." *Id. Travelers* and the instant case point the direction being taken by the Texas courts and demonstrate the need for immediate review.[7]

A tariff provision in effect on the date of shipment *cannot* be judicially questioned on the basis of reasonableness or public policy, as that issue is within the primary jurisdiction of the Civil Aeronautics Board. *Crosby & Co. v. Compagnie Nationale Air France*, 76 Misc. 2d 990, 352 N.Y.S. 2d 75, 82-83 (Sup. Ct.), *aff'd mem.*, 42 App. Div. 2d 1050, 348 N.Y.S. 2d 957 (1973), *motion for leave to appeal denied*, 33 N.Y. 2d 521, 353 N.Y.S. 2d 1025, 309 N.E. 2d 141, *cert. denied*, 416 U.S. 986 (1974). Administrative remedies must first be exhausted before any judicial determination can be made. *Crosby & Co. v. Compagnie Nationale Air France*,

[7] The Texas Court of Civil Appeals, in the recent case of *Farah Mfg. Co. v. Continental Airlines, Inc.*, Docket No. 6419 (Tex. Civ. App. — El Paso, June 18, 1975, writ filed) (not yet reported), similarly held an express air freight tariff requirement regarding written notice of claim to be unreasonable under the circumstances and, therefore, waived. This refusal to follow federal law parallels the course taken in *Travelers* and the instant case.

supra; see also Vogelsang v. Delta Air Lines, Inc., 302 F. 2d 709 (2d Cir.), *cert. denied*, 371 U.S. 826 (1962).

Thus, existing tariff provisions cannot be tested by Texas common law standards of causation and, if found wanting, discarded. A "sole proximate cause" standard has never been present in the Official Air Freight Rules Tariff. *See* Tariff Rules 30(B) (1) (b) and (c), *supra*. Yet, under the decision below and the earlier *Travelers* precedent, interstate air carriers operating in Texas are required to plead and prove such a standard to preclude liability at trial. Had this strict burden not been imposed, a different result would have been reached.

Furthermore, the Texas courts in this case not only failed to give effect to the clear meaning of Tariff Rule 26(F), prohibiting waiver, but totally ignored it.[8] If Tariff Rules 23(B), 26(F) and 34 were given effect, as intended by Congress and the Civil Aeronautics Board, the ultimate conclusion of the trial court and Texas Court of Civil Appeals regarding liability could not have been reached. Indeed, the tariff requirements were specifically designed to prevent the precise situation existing in this case.[9]

IV.

THE DECISION OF THE TEXAS COURT OF CIVIL APPEALS SHOULD BE REVIEWED DUE TO ITS RESULTANT EFFECT ON INTERSTATE AIR FREIGHT CARRIERS.

Public policy favors the right of an air carrier to determine its rates according to the risk assumed. *Blair v. Delta Air*

[8] Waiver was the sole basis of the trial court's judgment. The Court of Civil Appeals expressly ignored Rule 26(F) and Rule 34, which speaks to violation of "any of the rules" by a shipper or other party and the resultant legal effect.

[9] It is undisputed, from the trial record, that the purpose of these tariff requirements was to give the air carrier knowledge that a high-value shipment was coming and to afford the carrier an opportunity either to refuse the shipment or to arrange appropriate security and handling by qualified personnel. *See* Tariff Rules 23(B) and 26(F), *supra*. It is likewise clear from the record that these exact tariff requirements were specifically promulgated to prevent high-value shipments from being forwarded to Kennedy Airport, which has a "horrible reputation" for pilferage and theft, without advance security arrangements. *Id.*

Lines, Inc., 344 F. Supp. 360, 367 (S.D. Fla. 1972), *aff'd*, 477 F. 2d 564 (5th Cir. 1973). This is an "underlying principle" in public carrier legislation. *Southeastern Express Co. v. Pastime Amusement Co.*, 299 U.S. 28, 29 (1936). The Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et seq.*, effectuates this principle.

The Civil Aeronautics Board and the air freight carriers control risk in substantial part by the Official Air Freight Rules Tariff which governs rights and liabilities. *Tishman & Lipp, Inc. v. Delta Airlines, supra.* If the state courts do not apply and enforce tariff rules and regulations as written then, contrary to the intent and purpose of the Federal Aviation Act, there is an obvious uncontrolled increase in risk.

This Court's opinion in *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942), has substantial relevance to this petition. As did *Garrett*, the instant case involves concurrent jurisdiction. Mr. Justice Black, writing for the Court under similar circumstances, said:

> "The source of the governing law applied is in the national, not the state, governments. If by its practice the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the state would not enforce, but would actually deny, federal rights which Congress * * * intended to make not less, but more secure. The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended by the jurisdiction in which the right itself originates * * *. *So here, in trying this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected. Whether it did so raises a* [*reviewable*] *federal question* * * *." *Id.* at 245 [emphasis supplied].

The fine balance of rates versus risk must be maintained. The encroachment by Texas state courts into a federally preempted area must be strongly repudiated. Otherwise,

the significant rule-making rights granted the Civil Aeronautics Board and the air freight carriers by statute will have been rendered meaningless.

CONCLUSION

The Texas Court of Civil Appeals failed to apply federal law, depriving Braniff of a proper resolution of the parties' rights and liabilities. Texas precedent is inconsistent with federal decisions and imposes an unconscionable burden on interstate air freight carriers. This Petition for Writ of Certiorari should be granted and the decision below promptly reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney of record for Petitioner, Braniff Airways, Inc., hereby certifies as follow:

(a) that I am a member of the bar of the United States Supreme Court, and that I have duly served all parties required by the Rules of said Court to be served with the foregoing Petition for Writ of Certiorari, as hereinafter shown;

(b) that the names and addresses of the attorneys of record for each of the adverse parties are as follows:

William B. Duncan, P.O. Drawer 2800, El Paso, Texas 79999; attorney for Continental Airlines, Inc., as an entity, and as assignee of the rights and interest of El Paso Coin Company;

Norman N. Rosen, 809 El Paso National Bank Building, El Paso, Texas 79901; original attorney for El Paso Coin Company;

(c) that on this day I served three printed copies of the foregoing Petition for Writ of Certiorari on the said William B. Duncan and the said Norman N. Rosen, attorneys for said Respondents, by depositing same in the United States post office in El Paso, Texas, with first class postage prepaid, properly addressed to said attorneys for Respondents at their said adresses.

EXECUTED this the 26 day of August, 1975.

Harold E. Dow

Attorney for Petitioner, Braniff Airways, Inc.

APPENDIX

APPENDIX A

In the

DISTRICT COURT OF EL PASO COUNTY, TEXAS
ONE HUNDRED TWENTIETH JUDICIAL DISTRICT

No. 73-1129

EL PASO COIN COMPANY, INC.,
Plaintiff,

v.

CONTINENTAL AIRWAYS, INC., and
BRANIFF AIRWAYS INCORPORATED,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In response to the request of the Defendant Braniff Airways Incorporated, in the above entitled and numbered cause, I make and file the following as my findings of fact and conclusions of law therein.

FINDINGS OF FACT

1.

On December 18, 1972, Plaintiff, El Paso Coin Company, Inc., tendered three (3) cans containing coins to Defendant Continental Airlines, Inc., at El Paso, Texas, for shipment to LaGuardia Airport, New York, New York.

2.

Rapid Airbill No. 005-1307-5532 (Braniff's Exhibit D-1) was prepared at El Paso, Texas, in part by the consignor, Plaintiff herein, and in part by Defendant Continental Airlines, Inc., with a declared value of $26,625.00, and with the shipment described as "one can coin."

3.

Shipment was to be made by Continental to Dallas, for interchange to Braniff, and by Braniff to LaGuardia Airport, New York.

4.

Consignee was Henry Weissblatt, 25 Broad Street, New York, New York, and notation "N.O.A.", meaning notify on arrival at telephone number (212) 943-4141.

5.

No pre-arrangement was made with Continental for the shipment.

6.

Prior to December 18, 1972, Plaintiff had on various occasions shipped cans of coins by Continental, and no pre-arrangement had been made.

7.

Continental accepted the shipment, and forwarded it to Dallas.

8.

In preparing the shipment to go to Dallas, a copy of the airbill was placed in a clear plastic envelope (Continental's Exhibit D-2), so that the airbill could be read while the airbill was still in the envelope.

9.

A lot label (Continental's Exhibit D-3) was attached to the can of coins in question, showing that there was one item of cargo in the particular lot, since separate airbills were prepared on the three cans of coins.

10.

In Dallas, the shipment and the two other cans of coins were delivered by a Continental employee to Braniff, on a cargo truck or wagon.

11.

The cargo on the wagon was tendered to Braniff's employee, L. W. Robinson.

12.

L. W. Robinson did inspect and sign the transfer manifest (Plaintiff's Exhibit 2), which transfer manifest showed LaGuardia Airport as the destination of Rapid Airbill No. 005-1307-5532.

13.

The shipment of coins was in typical form; that is, for sometime prior to December 18, 1972, a requirement that coins be shipped in metal or wood containers, not canvas, had led to the practice of shipping coins in paint cans, as in this case.

14.

Robinson inspected the can, signed the manifest, and moved the can onto a Braniff truck or into a Braniff warehouse area.

15.

Robinson signed for shipment under Airbill No. 005-1307-5532, being the can of coins, and he saw the airbill in the envelope.

16.

No pre-arrangement had been made by Continental with Braniff for the shipment in issue.

17.

Prior to December 18, 1972, Continental had on various occasions shipped cans of coins for Plaintiff to New York, through Dallas and by Braniff, without pre-arrangement.

18.

Robinson knew, on receiving the can of coins, that no pre-arrangement had been made.

19.

Robinson could have refused to accept the shipment, or could have called his superior to determine if it should be refused or accepted.

20.

Braniff changed the routing from LaGuardia Airport in New York to Kennedy Airport in New York.

21.

At a later time, when the loss was investigated, a Dallas employee of Braniff said that the can of coins was placed in a certain igloo at a certain distance from the front of the igloo.

22.

The igloo in question was one that was placed on a Braniff cargo flight to Kennedy Airport in New York, rather than to LaGuardia Airport in New York.

23.

The cargo in the igloo was not identified on a manifest, but the weight of the can of coins was merely added to the total weight of the cargo in the igloo.

24.

The can of coins could have been segregated for special handling by employees who handled the can from the truck, or in the warehouse, or in loading the igloo, or the employees could have called same to the attention of supervisors for a decision on special handling.

25.

Two cans of coins were received by Braniff in New York at Kennedy Airport and were tendered to the consignee on December 22, 1972.

26.

One can of coins (the shipment here in issue) was not tendered to the consignee and could not be found by Braniff.

CONCLUSIONS OF LAW

1.

Defendant Continental Airlines, Inc., in accepting the can of coins and issuing Rapid Airbill No. 005-1307-5532 (Braniff Exhibit D-1), and by its previous conduct in dealing with the Plaintiff in accepting coins at El Paso, Texas, for shipment, waived the provisions of the applicable tariffs requiring advance arrangements for the shipping of high value cargo.

2.

Defendant Braniff Airways Incorporated, in receiving the can of coins in Dallas with Rapid Airbill No. 005-1307-5532 (Braniff Exhibit D-1) in full view, and by previous conduct, waived the provisions of the applicable tariffs requiring advance arangements for the handling of high value cargo.

3.

Defendant Braniff Airways Incorporated was negligent in changing the routing on the shipment in question from LaGuardia Airport, in New York, to John F. Kennedy Airport, in New York.

4.

Defendant Braniff Airways Incorporated, having undertaken to transport the shipment, as it did, to John F. Kennedy Airport, in New York, was negligent in failing to deliver the shipment to the consignee.

5.

Plaintiff El Paso Coin Company, Inc., is entitled to recover the value of the shipment from Defendants Continental Airlines, Inc., and Braniff Airways Incorporated, jointly and severally.

6.

The value of the coins on December 18, 1972, was $26,625.00.

7.

Plaintiff El Paso Coin Company, Inc., is entitled to recover legal interest on the value of the shipment from December 22, 1972.

8.

Plaintiff El Paso Coin Company, Inc., is not entitled to recover attorneys fees herein.

9.

Loss of the shipment of coins took place during transportation by the carrier Braniff Airlines Incorporated.

10.

Defendant Continental Airlines, Inc., is entitled to indemnity from Defendant Braniff Airways Incorporated.

SIGNED and ENTERED this 21st day of February, 1974.

Hans E. Brockmuller

Judge

In the

DISTRICT COURT OF EL PASO COUNTY, TEXAS
ONE HUNDRED TWENTIETH JUDICIAL DISTRICT

No. 73-1129

EL PASO COIN COMPANY, INC.,
Plaintiff,

v.

CONTINENTAL AIRLINES, INC. and
BRANIFF AIRWAYS INCORPORATED,
Defendants.

ADDITIONAL FINDINGS OF FACT

On this, the 1st day of March, 1974, in response to the motion of Defendant Braniff Airways Incorporated for additional findings of fact, the Court makes these additional findings of fact, and none other:

1.

Prior to and on December 18, 1972, the effective official Air Freight Tariffs published by the Civil Aeronautics Board as to air freight are as found in Exhibit No. 2 of Defendant Braniff Airways Incorporated.

2.

That the express provisions on Airbill No. 005-1307-5532 entered into by Continental Airlines, Inc., and El Paso Coin Company on December 18, 1972, states the following:

> "1. In rendering the shipment described herein for carriage Shipper agrees to these Conditions of Contract, which no agent or employee of the parties may alter, and that this airbill is non-negotiable and has been prepared by him or on his behalf by the carrier.

"2. It is mutually agreed that the shipment described herein is accepted on the date hereof in apparent good order (except as noted) for carriage as specified herein, subject to governing classifications and tariffs in effect as of the date hereof which are filed in accordance with law. Said classifications and tariffs are available for inspection by the parties hereto and are hereby incorporated into and made a part of this contract."

3.

The applicable tariffs specified that advance arrangements shall be made on shipments of extraordinary value at the time this shipment was made.

4.

Braniff Airways Incorporated had nothing to do with the preparation of Airbill No. 005-1307-5532 nor in the initial acceptance of the shipment on December 18, 1972, from El Paso Coin Company in El Paso, Texas.

Hans E. Brockmuller

Judge

In the

DISTRICT COURT OF EL PASO COUNTY, TEXAS

120TH JUDICIAL DISTRICT

No. 73-1129

EL PASO COIN COMPANY, INC.

v.

CONTINENTAL AIRLINES, INC. and
BRANIFF AIRWAYS INCORPORATED

JUDGMENT

On January 3, 1974, came on to be heard the above cause, and the parties waived a jury and announced ready, and the Court heard the pleadings and evidence, and having considered same and having considered the exhibits and the written arguments of counsel, and the Court being of the opinion that the following judgment should be entered:

It is ORDERED that Plaintiff, EL PASO COIN COMPANY, INC., recover the sum of $26,625.00, with interest on said sum at six percent per annum from December 22, 1972 jointly and severally against Defendants, CONTINENTAL AIRLINES, INC. and BRANIFF AIRWAYS INCORPORATED; and

It is ORDERED that CONINENTAL AIRLINES, INC. recover indemnity against BRANIFF AIRWAYS INCORPORATED.

Costs are taxed against Defendants, jointly and severally, with indemnity to CONTINENTAL.

For the relief ordered, let execution issue. Other relief prayed by Plaintiff is denied.

Signed and entered on January 25th, 1974.

Hans E. Brockmuller
Judge

FORM APPROVED:

Norman N. Rosen
Attorney for Plaintiff

William Duncan
Attorney for Continental

Sam Sparks
Attorney for Braniff

APPENDIX B

No. 6395

**Appeal from the District Court of
El Paso County, Texas**

BRANIFF AIRWAYS INCORPORATED,

Appellant,

v.

EL PASO COIN COMPANY, INC. and
CONTINENTAL AIRLINES, INC.,

Appellees.

OPINION

El Paso Coin Company recovered judgment against Continental Airlines and Braniff Airways for the value of one can of gold coins lost in a shipment from El Paso, Texas, to New York, New York. The shipment originated with Continental and the coins were lost while in the possession of Braniff and the trial Court allowed Continental judgment of indemnity against Braniff. Continental has now paid the judgment to El Paso Coin and Braniff brings this appeal. We affirm.

El Paso Coin Company delivered to Continental Airlines at the El Paso International Airport three five-gallon paint cans each containing 250 gold coins. A rapid airbill was prepared as to each can with some of the information being supplied by El Paso Coin and the other blanks being filled in by Continental. Proper tariff charges were paid. The can that was ultimately not delivered was given rapid airbill number 005-1307-5532. This airbill listed the value of the can of coins as $26,625.00, and listed the destination as LaGuarda Airport in New York. The three cans were transported by Continental to Dallas, Texas, where physical possession was taken by a Braniff employee who receipted for them through his endorsement of the cargo manifest. Braniff

changed the routing to Kennedy Airport in New York and two of the cans arrived there, and it is still not known what happened to the third can, which is the subject of this lawsuit. There is no question but that the loss occurred while the can of coins was in the possession of Braniff, but how or when the loss occurred is unknown. Appellant Braniff, says that the trial Court erred in rendering judgment against Braniff as El Paso Coin and/or Continental failed to comply with the applicable tariffs regarding the shipment in question. As to this, our conclusion is that under the circumstances in which the loss occurred while the shipment was in the possession of Braniff its liability for the loss is established, and this assertion of tariff violation amounts to an excuse for such liability which Braniff must prove. We arrive at this conclusion recognizing that Federal law controls, but that in this particular area as to air carriers there is no Federal regulation setting out the rights and liabilities between shipper and carrier and connecting carriers nor is it spelled out in the tariffs. The liabilities and rights of carriers in general are set forth in the Interstate Commerce Act, particularly the section known as the Carmack Amendment, 49 U.S.C.A. § 20(11) and (12). Under the Carmack Amendment a shipper establishes his prima facie case when he shows delivery in good condition, loss or damaged condition on arrival, and the amount of damages. The burden of proof is then upon the carrier to excuse the loss and show that it was free from negligence. Missouri Pacific Railroad Co. v. Elmore & Stahl, 337 U.S. 134, 84 S. Ct. 1142, 12 L. Ed. 194 (1964). The Federal Aviation Act has no such provisions as the Carmack Amendment and, as noted by the Texas Supreme Court, Congress has not seen fit to make the Carmack Amendment applicable to airline carriers. American Airlines, Inc. v. Miller, 163 Tex. 400, 356 S.W. 2d 771 (1962). In the case of Modern Wholesale Florist v. Braniff International Airways, Inc., 162 Tex. 594, 350 S.W. 2d 539 (1961), the Texas Supreme Court, speaking through the late Justice Norvell, said:

> "We recognize the established doctrine that the rights and liabilities in respect to damage to goods moving in interstate commerce are controlled by Acts of Congress,

agreements between the parties and common law principles accepted and enforced in the federal courts, but we have been cited to no federal case which holds that the common law presumption relating to terminal carriers has been abrogated by the adoption of the Federal Aviation Program, 49 U.S.C.A. § 1373. Such presumption is not a local Texas device but one that has general application throughout most common law jurisdictions. In the federal domain, it has been recognized and approved by the Supreme Court of the United States. In Chicago & Northwestern Ry Co. v. C. C. Whitnack Produce Co., 258 U.S. 369, 42 S. Ct. 328, 66 L. Ed. 665, (cited in the original opinion), it was held that the terminal carrier presumption was not abrogated by the adoption of the Carmack amendment. We may paraphrase the language of that opinion and say that we find nothing in 49 U.S.C.A. § 1373 which indicates a legislative purpose to abrogate the accepted common law doctrine concerning the terminal carrier presumption."

It was held in that case that the plaintiff in presenting its claim was entitled to rely on a presumption that damage to the goods in transit was caused by the terminal carrier even though the plaintiff did not know where and how the damage occurred and even though the tariff provided that the terminal carrier would not be liable for loss not caused by actual negligence of itself. Since the time of that case, Texas has adopted the Uniform Commercial Code, Tex. Bus. & Comm. Code Ann., and we think it is controlling of the matters presented in this case. The adoption of the Code repealed the bill of lading laws of Texas. See Uniform Commercial Code, 7 S. Tex. L. J. 161; Transition to Uniform Commercial Code, 29 Tex. B. J. 345; Construction and Effect of UCC Art. 7, 21 A.L.R. 3d 1339.

By Section 1.201 (6), the term "Bill of Lading" is made to include an airbill. Section 7.302 is very similar to the Carmack Amendment in that it provides that the issuer of a bill of lading is liable to anyone entitled to recover on the bill of lading for any breach of its obligations by a conecting carrier. It also provides that while the goods are

in his possession the duties of the connecting carrier are the same as those of the issuer, and that the issuer of such bill of lading is entitled to recover from the connecting carrier in possession of the goods when the breach of the obligation occurred. And the amount of recovery is such as may be evidenced by any receipt, judgment, or transcript thereof. See 9 Tex. Jur. 2d, Bills of Lading, p. 423. As applied to the case before us, this would make Continental liable to El Paso Coin for the loss which occurred while the coins were in the possession of Braniff and it would entitle Continental to then recover the amount paid the El Paso Coin Company from Braniff. That is what the judgment in this case does. In addition to the liability imposed by Section 7.302, Section 7.403 imposes the obligation to deliver the goods to the rightful person unless certain enumerated excuses are proved by the carrier. None of those excuses are pertinent here, and Braniff is liable under this section of the Code unless its tariff-violations excuse can be upheld. Under the provisions of the Code cited, Braniff stands liable as a prima facie case was made. It has not refuted the facts establishing that liability. Instead, it stands on the proposition, which it pled, that the sole proximate cause of the loss was the failure of El Paso Coin and/or Continental Airlines to comply with the applicable tariffs with regard to this shipment. The applicable tariffs specified that advance arrangements shall be made on shipments of extraordinary value. The shipment in question was a shipment of extraordinary value and the advance arrangements were not made. The burden of proof was on Braniff to establish this pleading of sole proximate cause, and the trial Court, sitting without a jury, obviously found against it, and we are of the opinion that the evidence sustains this implied finding of the trial Court. In the case of Travelers Insurance Company v. Delta Air Lines, Inc., 498 S.W. 2d 443 (Tex. Civ. App. — Texarkana 1973, no writ), almost the same contention was made in that it was contended that had the agents of the airline known that the shipment contained jewelry it would have inaugurated special handling procedures designed for high risk shipments and as a result the shipment would not have

been lost. In rejecting this excuse of the carrier, the Court pointed out what is also true here. That is, that it is not known how the loss occurred, therefore, it cannot be said that the special handling procedure would have prevented that particular loss. Since no one knows what happened to the shipment or when or what caused or contributed to the happening, there is an absence of evidence that the acts of El Paso Coin and Continental had any casual connection with the loss. More specifically, Braniff's pleading of sole proximate cause is not sustained by this speculative evidence.

Appellant Braniff urges that the trial Court erred in finding that there was a waiver of the tariff provisions, and also that by the very terms of the tariff, they could not be waived. These questions are academic, since we have determined that the failure to comply with the tariff did not relieve Braniff of liability under the manner in which the case was tried. If the waiver would not affect the outcome, it matters not whether there could be or was such a waiver.

Appellant's final point of error is that the Court erred in finding Braniff negligent. This, too, was covered by our prior discussion.

The judgment of the trial Court is affirmed.

December 31, 1974.

/s/ Stephen F. Preslar

Stephen F. Preslar, *Chief Justice*

APPENDIX C

APPENDIX C

In The

SUPREME COURT OF TEXAS

May 7, 1975

No. B-5143

EL PASO COUNTY, EIGHTH DISTRICT

BRANIFF AIRWAYS, INC.

v.

EL PASO COIN COMPANY ET AL.

Application of petitioner for writ of error to the Court of Civil Appeals for the Eighth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, Braniff Airways, Inc., and its surety, Employers Service Corporation, pay all costs incurred on this application.

June 4, 1975

No. B-5143

EL PASO COUNTY, EIGHTH DISTRICT

BRANIFF AIRWAYS, INC.

v.

EL PASO COIN COMPANY ET AL.

Petitoner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

C-2

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this, the 4th day of June, 1975.

GARSON R. JACKSON, Clerk

By MARY M. WAKEFIELD, Deputy.

Mary M. Wakefield

APPENDIX D

APPENDIX D

STATUTES AND REGULATIONS INVOLVED

1. The pertinent federal statutes read as follows:

   (a) 49 U.S.C. § 1321(a)(1), which reads in pertinent part:

   "The Civil Aeronautics Board * * * is * * * an agency of the Unted States * * *."

   (b) 49 U.S.C. § 1324(a), which reads in pertinent part:

   "The Board is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedures * * * as it shall deem necessary * * * to exercise and perform its powers and duties * * *."

   (c) 49 U.S.C. § 1373(a), which reads in pertinent part:

   "Every air carrier * * * shall file with the Board, and print, and keep open to public inspection, tariffs * * * showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation."

2. The pertinent regulations of the Civil Aeronautics Board read as follows:

   (a) 14 C.F.R. § 221.38(a), which reads in pertinent part:

   "[T]he rules and regulations of each tariff shall contain:

   (1) Such explanatory statements regarding the fares, rates, rules or other provisions contained in the tariff as may be necessary to remove all doubt as to their application."

   (b) 14 C.F.R. § 221.102, which reads in pertinent part:

   "All the rules and regulations required by and conforming to § 221.38 may be published in a single separate governing tariff * * *."

3. The pertinent provisions of the Official Air Freight Rules Tariff No. 1-B, "Rules and Regulations," C.T.C. (A) No. 39, C.A.B. No. 96, in effect on December 18 and 19, 1972, read as follows:

(a) Rule 2, which reads in pertinent part:

"'Articles of extraordinary value' shall mean * * * Gold Bullion, Coined, Uncoined * * * Money * * *."

(b) Rule 23(B), which reads in pertinent part:

"Acceptance of Articles of Extraordinary Value * * * Shipments containing articles of extraordinary value * * * will be accepted for transportation provided that:

(1) Advance arrangements are made for the shipment.

(2) The shipper must tender the shipment at an area designated by the carrier at the carrier's airport terminal not more than three hours prior to the scheduled departure of the flight for which advance arrangements have been made.

(3) The shipper shall state in writing that the consignee will accept delivery of the shipment at the airport of destination within three hours after the scheduled arrival time of the flight."

(c) Rule 26(F), which reads in pertinent part:

"[N]o agent, servant or representative of the carrier has authority to alter, modify or *waive* any provisions of the contract of carriage or of this tariff." [Emphasis supplied].

(d) Rule 30(B) (1) (b):

"The carrier shall not be liable if it proves that it and its agents have taken all necessary measures to avoid the damage or that it was impossible for the carrier or its agents to take such measures."

(e) Rule 30(B) (1) (c):

"The carrier shall not be liable for damage caused by the act or default of the consignor or the consignee."

(f) Rule 34, which reads in pertinent part:

"The shipper and consignee shall be liable, jointly and severally, to pay or indemnify the carrier for all claims * * * damages * * * or other sums which may be incurred, suffered or disbursed by a carrier by reason of any violation of any of the rules contained in applicable tariffs or any other default of the shipper or such parties with respect to a shipment."

APPENDIX E

APPENDIX E

SUMMARY IN ACCORDANCE WITH RULE 23(f)

In accordance with this Court's Rule 23(f), the following pleading excerpts and points of error are presented. A federal question was raised at each judicial level below in a timely and proper fashion.

1. The following pleading was part of Petitioner's first amended answer in the trial court:

IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS, 120TH JUDICIAL DISTRICT

DEFENDANT'S FIRST AMENDED ANSWER AND CROSS-CLAIM

Comes now Braniff Airways, Incorporated, one of the Defendants in the above styled and numbered cause, and files this, its First Amended Original Answer and Cross-Claim and states as follows:

II.

This Defendant would show the Court that the Plaintiff, El Paso Coin Company, Inc., as well as the Defendant, Continental Airlines, Inc., failed to comply with the applicable tariffs in effect at the time of this shipment * * *.

2. The following grounds were set forth in Petitioner's motion for new trial in the trial court:

IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS, 120TH JUDICIAL DISTRICT

MOTION FOR NEW TRIAL

III.

This Honorable Court erred in failing to enforce the applicable tariffs against El Paso Coin Company, Inc.

IV.

This Honorable Court erred in failing to enforce the applicable tariffs against Continental Airlines, Inc.

V.

This Honorable Court erred in following the state law and not enforcing the federal law.

3. The following points of error were raised in Petitioner's appeal to the Texas Court of Civil Appeals:

IN THE COURT OF CIVIL APPEALS FOR THE EIGHTH SUPREME JUDICIAL DISTRICT OF TEXAS

POINTS OF ERROR

POINT I

THE TRIAL COURT ERRED IN RENDERING JUDGMENT AND INDEMNITY AGAINST BRANIFF AS EL PASO COIN AND/OR CONTINENTAL FAILED TO COMPLY WITH THE APPLICABLE TARIFFS REGARDING THE SHIPMENT IN QUESTION.

POINT II

THE TRIAL COURT ERRED IN CONCLUDING AS A MATTER OF LAW THAT BRANIFF WAIVED THE APPLICABLE TARIFFS. THE FACTUAL FINDINGS UTILIZED TO SUPPORT THIS CONCLUSION ARE WHOLLY UNSUPPORTED BY THE EVIDENCE.

A. THE TRIAL ERRED IN MAKING FACTUAL FINDING NO. 14.

B. THE TRIAL COURT ERRED IN MAKING FACTUAL FINDING NO. 15.

C. THE TRIAL COURT ERRED IN MAKING FACTUAL FINDING NO. 18.

POINT III

THE TRIAL COURT ERRED IN CONCLUDING AS A MATTER OF LAW THAT BRANIFF WAS NEGLIGENT IN CHANGING THE ROUTING OF THE SHIPMENT IN QUESTION AND IN FAILING TO DELIVER SAID SHIPMENT.

4. The following points of error were raised in Petitioner's appeal to the Texas Supreme Court:

IN THE SUPREME COURT

POINTS OF ERROR

I.

THE COURT OF CIVIL APPEALS ERRED IN HOLDING THE TEXAS BUSINESS AND COMMERCE CODE THE CONTROLLING LAW REGARDING THIS INTERSTATE COMMERCE TRANSACTION.

II.

THE COURT OF CIVIL APPEALS ERRED IN OVERRULING PETITIONER'S POINT OF ERROR THAT THE TRIAL COURT ERRED IN FINDING PETITIONER WAIVED THE REQUIREMENTS OF THE APPLICABLE TARIFFS.

III.

THE COURT OF CIVIL APPEALS ERRED IN OVERRULING PETITIONER'S POINT OF ERROR THAT THE TRIAL COURT ERRED IN RENDERING JUDGMENT AND INDEMNITY AGAINST PETITIONER AS EL PASO COIN COMPANY AND CONTINENTAL AIRLINES FAILED TO COMPLY WITH THE APPLICABLE TARIFFS REGARDING THIS INTERSTATE SHIPMENT.

IV.

THE COURT OF CIVIL APPEALS ERRED IN HOLDING THE TRIAL COURT'S FINDING THAT PETITIONER HAD WAIVED THE TARIFF REQUIREMENTS WAS "ACADEMIC" AS THIS EXPRESS WAIVER FINDING WAS THE SOLE BASIS FOR THE TRIAL COURT'S JUDGMENT OF LIABILITY AGAINST PETITIONER AND PRECLUDED PETITIONER'S DEFENSES UNDER APPLICABLE TARIFFS.

V.

THE COURT OF CIVIL APPEALS ERRED IN HOLDING THERE WAS AN IMPLIED FINDING OF FACT REGARDING THE ISSUE OF CAUSATION BETWEEN THE FAILURE TO COMPLY WITH APPLICABLE TARIFFS AND THE LOSS OF SHIPMENT IN QUESTION.

VI.

THE COURT OF CIVIL APPEALS ERRED IN OVERRULING PETITTIONER'S POINT OF ERROR THAT THE TRIAL COURT ERRED IN FINDING PETITIONER NEGLIGENT IN CHANGING THE ROUTING OF THE SHIPMENT AND THEREAFTER FAILING TO DELIVER THE SHIPMENT.

Supreme Court, U. S.
FILED
SEP 23 1975
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-320

BRANIFF AIRWAYS, INC.

Petitioner,

v.

EL PASO COIN COMPANY, INC., and
CONTINENTAL AIRLINES, INC.,

Respondents.

Brief of Respondent, Continental Airlines, Inc.,

WILLIAM DUNCAN,
Of Counsel:
KEMP, SMITH, WHITE,
DUNCAN & HAMMOND,
P. O. Box 2800,
El Paso, Texas 79999,
Attorneys for Respondent,
Continental Airlines, Inc.

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In the

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-320

BRANIFF AIRWAYS, INC.

Petitioner,

v.

EL PASO COIN COMPANY, INC., and CONTINENTAL AIRLINES, INC.,

Respondents.

Brief of Respondent, Continental Airlines, Inc.,

Respondent, Continental Airlines, Inc., urges that writ of certiorari be denied.

JURISDICTION

This case is controlled by the findings of fact that were made by the state courts, which findings determine whether in fact Petitioner waived the limiting language of the tariff at the time Petitioner received and accepted the shipment, and whether in fact Petitioner, in the face of the terminal carrier presumption, proved an excuse for the loss in question. It is necessary to consider the factual matters in order

to pass upon the question of whether Petitioner has been denied a Federal "right" which Petitioner claims the tariff gives to Petitioner. Only "exceptional circumstances" would justify rejecting the findings of fact in the state courts. *Evco v. Jones*, 409 U.S. 91 (1972); *Fry Roofing v. Wood*, 344 U.S. 157 (1952). "The ordinary rule applies that the decision of the state court upon a question of fact cannot be made the subject of inquiry here". *Grayson v. Harris*, 267 U.S. 352, 358.

The Texas courts did not refuse to apply the air freight tariff, as Petitioner asserts. The District Court found (Petition Appendix A-7) that the tariff was in force as to the shipment, requiring advance arrangement for shipments of extraordinary value. The Court of Civil Appeals found (Petition Appendix B-2) that proof of a tariff violation as the cause of loss could be a defense. The state courts recognized that Federal law controls, but this case did not come out of a vacuum; instead, it came out of a particular set of facts. The District Court found (Petition Appendix A-4, A-5) that Petitioner's agent knew the shipment was high value, could have rejected it, but accepted it, and that Petitioner was negligent in handling the shipment. The Court of Civil Appeals found (Petition Appendix B-4) that Petitioner did not refute the facts establishing liability, or prove a defense.

This case is controlled by the facts, and is not a proper case for exercise of jurisdiction.

QUESTION PRESENTED

Does an air carrier, which knowingly accepts a high value shipment, where prearrangement has not been made by the shipper or originating carrier, waive the tariff requirement of prearrangement, does the terminal carrier presumption apply, and must the terminal carrier prove an excuse for the loss.

STATEMENT

Statement by Petitioner omits the following:

Petitioner's agent, Robinson, received the shipment in Dallas and signed the transfer manifest. The air bills were in clear plastic envelopes, one attached to each can of coins, and the air bill in question said "one can coins", "$26,625.00". Robinson's superiors testified that Robinson's duty was to inspect the cargo, that Robinson could have refused the shipment or called a supervisor to see if the shipment should be refused, but that the shipment was accepted and physically handled by Robinson and other agents. All agents knew that no prearrangement had been made, because in fact none had been made. Petitioner called three agents to testify, though none had personal knowledge of Robinson's acts, but Petitioner did not call Robinson, still an employee at time of trial.

Robinson could have sent the valuable shipment in for security handling, but he did not, nor did others who handled it. Petitioner's witnesses said that later it was determined that the three cans were recalled as being in an igloo on a freight flight to Kennedy New York, but there was no record of this, since the manifest on the igloo in question showed only a total weight. Two of the cans were accounted for at Kennedy, but not the third. It is not known whether the loss took place in Dallas or at Kennedy.

The air bill called for shipment to LaGuardia.

REASONS FOR DENYING THE PETITION

The petition for writ of certiorari should be denied because the judgment and appellate opinion of the state courts are correct; the judgment arises from a particular fact situation and the case has minimal effect as precedent; and Petitioner's position in asking certiorari is not consistent with the position taken in state courts, where Petitioner now says there can be no waiver of the tariff provision for prearrangement, but in state court said there could be waiver if the facts showed Robinson's knowledge of the value when he accepted the shipment.

I

THE JUDGMENT AND APPELLATE OPINION OF THE STATE COURTS ARE CORRECT. FEDERAL LAW WAS CORRECTLY APPLIED.

The case having been tried without a jury, it was for the Trial Judge to determine the credibility of the witnesses and the weight to be given their testimony. 4 *Texas Jurisprudence* (2) 398, Appeal and Error — Civil, section 839. There was ample evidence that Petitioner's agent, Robinson, saw the air bill when he signed for the shipment and handled the cans, and thus he knew the information on the air bill. He knew that the cargo was one can of coins, value of $26,625.00. Moreover, he knew that paint cans were the usual means of shipping coins by air freight, and he knew that there was a great deal of traffic in the coin business, since this was widely known by the airlines. Moreover, the Trial Judge could weigh the evidence regarding Robinson's knowledge of the value of a coin shipment in the light of the fact that Petitioner did not call its employee Robinson to the witness stand. Robinson was still in Petitioner's employ at the time of trial, and Petitioner brought three employees to the trial, but not the one witness who could clearly say the nature of inspection of the cargo made by Robinson and the extent of Robinson's knowledge at the time he received the shipment and signed for it "in good order". Where a party fails to call a witness who has knowledge of facts and whose testimony is available, such failure creates a presumption that the testimony, if produced, would be *un*favorable to the party on the issue involved. McCormick & Ray, *Texas Evidence*, vol. 1, page 138, section 101 (2nd edition, 1956). The economic interests of an employee such as Robinson make him peculiarly available to the employer. 29 *American Jurisprudence* (2) 224, Evidence, section 180, 181.

So, beyond question the Trial Judge was correct in finding that Robinson inspected the can, signed the manifest, moved the can onto Petitioner's truck and saw the air bill in the envelope. At that time, Robinson knowingly received a high value shipment, knowing that no prearrangement had been made for the shipment and knowing that he was not receiving or handling it under procedures for high value shipments. Thus, the facts for waiver took place.

The tariff provision for prearrangement of valuable shipments could be waived by Petitioner. 13 *Corpus Juris Secundum* 226, Carriers, section 114. The waiver here took place at the time Petitioner undertook the shipment. Such circumstances are distinguishable from cases where a waiver is asserted by reason of things done by the carrier *after* the shipment is in progress, as in *Chesapeake Ry. v. Martin*, 283 U.S. 209 (1931) or *Lichten v. Eastern Airlines*, 189 F. (2d) 939 (Second Circuit, 1951). An air carrier's tariff can be waived, *Orlone v. Phillipine Air Lines*, 257 F.(2) 384 (Second Circuit, 1958), cert. den., 358 U.S. 909; further, the doctrine of primary and secondary liability apparently still has application in indemnity matters such as this. Such would be significant where Respondent's negligence was in accepting the shipment of coins, and the Petitioner's negligence was in (1) accepting the forwarding of the shipment, (2) handling the can several times without applying security, (3) changing the routing and (4) losing the shipment.

If an airline literally could never be said to have waived a tariff, then it could impose on its customers. Suppose a carrier accepted the cans at its counter and wrote air bills on high value (as Respondent did in this case), then later said it had not waived the tariff requirement of prearrangement. That would be unconscionable. It is obvious that the value was known when the shipment was accepted. Yet, the finding of fact is that Petitioner's agent knew the value when Petitioner accepted the shipment, though it took more effort to prove that agent's knowledge, where he was absent and Petitioner's other witnesses had no personal knowledge of the receipt of the shipment in Dallas. The District Court found the facts of waiver. The Court of Civil Appeals affirmed the judgment. Both courts applied Federal law.

The Court of Civil Appeals called the subject of waiver "academic", because it held, by authority citing *Chicago & Northwestern Ry. v. Whitnack*, 258 U.S. 369 (1922), that the presumption applies that the terminal carrier caused the loss. The Court said the tariff does not speak to this subject — "the rights and liabilities between shipper or carrier and connecting carrier" — but that the presumption does, and so does the Uniform Commercial Code. The Court is correct in this, and even if it is said to be wrong in calling waiver "academic" then the judgment of the District Court is correct on the basis of waiver.

The Court of Civil Appeals placed the burden of proof according to *Missouri Pacific v. Elmore*, 377 U.S. 134 (1964) and held as a matter of fact that Petitioner did not meet the burden. The facts, the presumptions and the law were against Petitioner.

The state court did not ignore or refuse to apply Federal law, and the state court rulings are correct.

II

THE CASE HAS MINIMAL EFFECT AS PRECEDENT.

This case came out of a particular fact situation, fully stated in the Court of Civil Appeals opinion, and is precedent only in another case where a carrier accepts a shipment knowing that the tariff provision of prearrangement for the shipment has not been met. It is not new authority on the subject of waiver, presumptions or burden of proof.

Petitioner says this case, along with *Travelers Insurance Co. v. Delta Air Lines*, 498 S.W. (2d) 443 (Tex. Civ. App., 1973, no writ history), and *Farah Mfg. v. Continental Airlines*, 524 S.W. (2d) 815 (Tex. Civ. App., 1975, application for writ filed), show a "direction being taken by Texas Courts", needing review. In *Farah* the parties presented a law question when each filed a motion for summary judgment, and the state courts had to decide whether time allowed in the tariff for filing claim is extended when the carrier knows of the loss, does not advise the shipper, and

the shipper has not discovered the loss. Federal authority is cited and distinguished, and *Farah* does not appear to be curious precedent. In *Travelers* the insurance company apparently did not consider the case a bad trend, though Petitioner says it does, for an application was not filed to ask review by the Supreme Court of Texas. The airline agents in *Travelers* said they would have initiated a security handling of the shipment if it had been known the shipment contained jewelry. In our case, the airline agents knew the shipment was a valuable item, but did not initiate security handling.

III

PETITIONER NOW SAYS THERE COULD BE NO WAIVER. IN THE STATE COURTS, PETITIONER GRANTED THAT WAIVER DEPENDED ON THE FACTS.

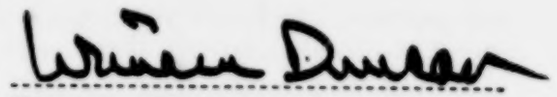
In its petition, Petitioner now says the District Court's finding of waiver "was in direct contravention of Rule 26(F) of the tariff" (page 3), and complains that the Court of Civil Appeals "sidestepped" the subject (page 4).

However, in its Application for Writ of Error in the Supreme Court of Texas, Petitioner briefed the point (Appendix A-1 hereto), saying "Petitioner contends the tariff requirements cannot be waived, as a matter of law, and further contends there is no evidence supporting the trial court's findings of waiver factually. First, the tariffs themselves state there can be no waiver * * * Secondly, there is no evidence supporting the trial court's findings of fact on waiver * * *". This was recognized as the point of the case. The requirement for prearrangement could be waived by Petitioner, by knowingly accepting the valuable shipment, and there was waiver here. This continues to be the point of the case, and the Court of Civil Appeals is correct in the further finding that the terminal carrier presumption placed a burden of proof on Petitioner which Petitioner failed factually to discharge.

CONCLUSION

Petition for Writ of Certiorari should be denied.

Respectfully submitted,



WILLIAM DUNCAN,

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Continental Airlines, Inc.

CERTIFICATE OF SERVICE

The undersigned attorney of record for Respondent, Continental Airlines, Inc., hereby certifies as follows:

(a) that I am a member of the bar of the United States Supreme Court, and that I have duly served all parties required by the Rules of said Court to be served with the foregoing Brief, as hereinafter shown;

(b) that the names and addresses of the attorneys of record for each of the adverse parties are as follows:

Harold L. Sims, P. O. Drawer 1977, El Paso, Texas 79950; attorney for Braniff Airways, Inc., Petitioner;

Norman N. Rosen, 809 El Paso National Bank Building, El Paso, Texas 79901; original attorney for El Paso Coin Company;

(c) that on this day I served three printed copies of the foregoing Brief on Harold L. Sims and Norman N. Rosen, by depositing same in the United States post office in El Paso, Texas, with first class postage prepaid, properly addressed to said attorneys at their said addresses.

EXECUTED this 22 day of September, 1975.

Attorney for Respondent,
Continental Airlines, Inc.

EXCERPT FROM PETITIONER'S BRIEF IN SUPREME COURT OF TEXAS

POINT II (RESTATED)

THE COURT OF CIVIL APPEALS ERRED IN OVERRULING PETITIONER'S POINT OF ERROR THAT THE TRIAL COURT ERRED IN FINDING PETITIONER WAIVED THE REQUIREMENTS OF THE APPLICABLE TARIFFS.

BRIEF OF POINT II

Liability in the trial court was adjudged against Petitioner *solely* on the basis of waiver and resulting negligence in re-routing the shipment from La Guardia Airport to John F. Kennedy Airport and, after such re-routing, failing to deliver (Conclusions of Law 1-4). Petitioner contends the tariff requirements cannot be waived, as a matter of law, and further contends there is no evidence supporting the trial court's findings of waiver factually.

First, the tariffs themselves state there can be no waiver. Rule 26f, applicable on December 18, 1972, read as follows:

> "* * * No agent, servant or representative of carrier has authority to alter, modify or *waive* any provision of the contract of carriage or of this tariff." (Emphasis supplied). (S.O.F. Def. Ex. 2).

In addition, it has been judicially determined that a carrier cannot be estopped from invoking tariff requirements nor can a carrier waive the requirements. *Chesapeake & O. Ry. Co. v. Martin*, 283 U.S. 209 (1931); *Schneinman v. Eastern* Airlines, 318 NYS 2d 992 (1971); and *Lichten v. Eastern Airlines, supra.*

Secondly, there is no evidence supporting the trial court's findings of fact on waiver. Findings of Fact 12 and 14 state that Robinson "did inspect"; there was no direct evidence as to what Robinson actually did, although it is clear under the applicable tariffs Robinson had no duty of inspection whatsoever. (Tariff Rule 24, S.O.F. Def. Ex. 2). In Findings

of Fact 15 and 18, the trial court found Robinson "saw the airbill" and that he "knew" no pre-arrangements had been made; as previously stated, there is no evidence of what Robinson saw or did in the trial record and it has been previously established it was not necessary for Robinson to ever look at the airbill to do his job. In Finding of Fact 17, the trial court found that prior to December 18, 1972, Continental had made similar shipments to New York using Braniff as a connecting carrier without pre-arrangements; this is not supported in the evidence as the director of cargo service of Continental, Herman Blann, testified that he could not specifically recall prior shipments to December 18, 1972 (S.O.F. 126) and, further, there was no evidence that Petitioner had ever known that shipments of extraordinary value were shipped without advance arrangements being made.

There is absolutely no factual basis supporting the trial court's finding that Petitioner specifically waived tariff requirements of advance arrangements regarding shipment under airbill 005-1307-5532.

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 75-320

In the Supreme Court of the United States

OCTOBER TERM, 1975

BRANIFF AIRWAYS, INC., PETITIONER

v.

EL PASO COIN COMPANY, INC. AND
CONTINENTAL AIRLINES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE EIGHTH SUPREME JUDICIAL DISTRICT OF TEXAS

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The United States submits this memorandum as *amicus curiae* in response to this Court's invitation of October 20, 1975.

1. On December 18, 1972, El Paso Coin Company tendered three cans containing gold coins to Continental Airlines at El Paso, Texas, for shipment to La Guardia Airport, New York. An airbill placed on each can of coins in a clear plastic envelope described the shipment as "one can coin" and declared the value of the shipment to be $26,625.00 (Pet. App. A-1, A-2). Continental delivered the coins to Braniff Airways at Dallas, Texas, and Braniff agreed to deliver the coins to La Guardia Airport (*id.* at A-2, A-3). Because no additional flights to La Guardia were scheduled for that day, Braniff altered the destination to Kennedy

Airport. Braniff's flight manager at Kennedy received two of the cans and properly delivered them. The third can of coins could not be found by Braniff (*id.* at A-4).

The District Court of El Paso County held that Braniff was negligent both in changing the routing of the shipment from La Guardia Airport to Kennedy Airport and in failing to deliver the shipment to the consignee (*id.* at A-5). Rejecting the carriers' argument that their air carrier tariffs, which had been filed pursuant to federal law, required advance arrangements on shipments of extraordinary value as a condition precedent to holding the carriers liable, the court held that both carriers waived the tariffs in two ways: (1) by accepting the cans of coins with the airbills in plain view, and (2) by a prior course of conduct, pursuant to which Continental had on various occasions shipped cans of coins for the El Paso Coin Company to New York, through Dallas and by Braniff, without advance arrangements (*ibid.*). The court entered judgment in the amount of $26,625 jointly and severally against Continental and Braniff. Continental paid the judgment and was awarded a judgment against Braniff, which appealed.

The Court of Civil Appeals affirmed, recognizing that federal law controls but concluding that "there is no Federal regulation setting out the rights and liabilities between shipper and carrier and connecting carriers nor is it spelled out in the tariffs" (Pet. App. B-2). Accordingly, the court turned to the Texas Uniform Commercial Code. The court held that under the Uniform Commercial Code Braniff was liable for the loss of the coins. The court conceded that a contrary provision in the tariff might have been dispositive, but it held that the tariff as actually written did not support Braniff's position (*id.* at B-4). Finally, addressing Braniff's argument that provisions in the tariff may not be waived, the court concluded that the

question was academic because Braniff had not established that the sole proximate cause of the loss was the failure of either El Paso Coin or Continental to make advance arrangements for shipment of the coins (*id.* at B-5).

2. Petitioner contends that disputes concerning the rights and liabilities of shippers and carriers in interstate air freight transactions must be resolved by applying federal law and that, under federal law (which, it contends, is embodied in its tariff), it cannot be held liable. Although the United States supports petitioner's argument that tariffs supersede inconsistent provisions of state or local law,[1] this case does not require decision upon that argument. The Texas Court of Civil Appeals acknowledged that the tariffs would prevail to the extent they were inconsistent with state law, and held only that there was no inconsistency.

Braniff relies upon Tariff Rule 23(B). That rule provides (Pet. App. D-2) that articles of extraordinary value "will be accepted for transportation provided that * * * advance arrangements are made for the shipment." The rule has two effects: (1) it entitles an air carrier to refuse to accept the shipment if no advance notice is given, and (2) it requires the carrier to accept the shipment if the advance notice is given. In order for Braniff to prevail, the rule would be required to have still a third effect: it would have to *forbid* the air carrier to accept the shipment in the absence of advance notice. But the language of the rule will not bear such a construction. Nor is such a construction suppported by what we understand to be the purpose of the rule—to give the air carrier time to take precautions against loss when it believes such precautions justified. Since the rule does not forbid a carrier to accept a shipment without advance notice, Continental's and Braniff's employees did not violate the tariff by their actions.

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[1]See, *e.g.*, *Blair* v. *Delta Air Lines, Inc.*, 344 F. Supp. 360 (S.D. Fla.), affirmed *per curiam*, 477 F.2d 564 (C.A. 5).

Moreover, Braniff did not establish that a violation of Rule 23(B) would relieve it from liability to the shipper. Tariff Rule 30(B) (1) (b) provides (Pet. App. D-2) that a carrier is not liable for loss "if it proves that it and its agents have taken all necessary measures to avoid the damage or that it was impossible for the carrier or its agents to take such measures." And Rule 30(B) (1) (c) provides (Pet. App. D-3) that "[t]he carrier shall not be liable for damage caused by the act or default of the consignor or the consignee." These rules—not Tariff Rule 23 (B)—establish the limits upon Braniff's liability, and the Texas courts were entitled to conclude that Braniff had not taken the necessary precautions or shown that the loss was caused by either the consignor or the consignee.

Accordingly, the result reached by the lower courts is consistent with Braniff's liability under its tariffs. The question stated in the petition is not properly presented on the facts of this case. Although the Texas courts should have looked initially to Tariff Rule 30 rather than to the Uniform Commercial Code, Braniff has not been prejudiced by any error the courts may have committed.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

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[2]Resolution of the question whether tariffs preempt state law would also be premature, because the Civil Aeronautics Board is now conducting a full scale investigation of the air carriers' tariff rules relating to liability and claims. *Liability and Claim Rules and Practices Investigation*, Docket 19923.

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